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IN THE

Supreme Court of the United States

October Term, 1958.

No. 177

HARRY J. ALKER, JR.,
Petitioner,

v.

ESTATE OF GEORGE RENTSCHLER, Deceased,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

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No.

HARRY J. ALKER, JR.,

Petitioner,

v.

ESTATE OF GEORGE W. RENTSCHLER, DECEASED.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Petitioner, Harry J. Alker, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on April 15, 1958.

CITATIONS TO OPINIONS BELOW.

The opinion of the Orphans' Court for the County of Philadelphia is reported in 11 Pa. D & C 2d 357 (R. 157a). The opinion of the Orphans' Court en banc is reported in 11 Pa. D & C 2d 357, 372 (R. 179a).

The opinion of the Supreme Court of the Commonwealth of Pennsylvania printed in the Appendix hereto *infra* p. 13 and is reported in 352 Pa. 47, 139 A. 2d 901.

A per curiam opinion denying the petitioner's timely filed petition for reargument was filed on April 15, 1958. This opinion is unreported and is printed in the Appendix hereto *infra* p. 13.

JURISDICTION.

The Supreme Court of the Commonwealth of Pennsylvania entered judgment on March 17, 1958. Rehearing was denied on April 15, 1958 Appendix hereto, *infra* p. 13.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is Act of June 24, 1948, c. 646, 62 Stat. 869, 28 U. S. C., Sec. 1257(3).

QUESTION PRESENTED.

Was the petitioner accorded due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, when, in a proceeding to remove him as executor and trustee, the Trial Judge based his opinion on a conviction in the process of being appealed, a superseded court decision, bare indictments and accusations, and facts outside the record with no opportunity afforded the petitioner to rebut or cross-examine the same.

THE CONSTITUTIONAL PROVISION INVOLVED.

This proceeding concerns the due process clause of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, which is printed in the Appendix hereto, *infra* p. 13.

STATEMENT OF THE CASE.

This cause arises with the filing on behalf of Wilhelmina L. Rentschler of a petition to remove the petitioner as co-executor and co-trustee under the will of George W. Rentschler, Deceased. There were three co-fiduciaries, one a corporate trust company, which had physical control of all the estate assets. The grounds for removal alleged that the petitioner was physically and emotionally unable to discharge his fiduciary duties and that the continuance of the petitioner in his fiduciary office would jeopardize the interests of the estate by reason of the fact that the petitioner had been convicted in the United States District Court for the Eastern District of Pennsylvania on a charge of attempting to evade and defeat the income tax laws of the United States (R4).

An answer sur petition for removal of fiduciary was filed in petitioner's behalf on November 16, 1956 (R18). The reply to new matter was filed on December 3, 1956, by Wilhelmina L. Rentschler (R23). Trial was had before the hearing Judge, the Honorable Harold D. Saylor, on issues thus joined. Witnesses were produced and testimony was taken. At the trial there was admitted into evidence, over the objection of petitioner's counsel, records of the petitioner's conviction in the United States District Court for the Eastern District of Pennsylvania, No. 18306, on a charge of attempting to evade and defeat income tax (26 U. S. C. 145(b)). At the same time, again over counsel's objection, there was admitted into evidence the bare indictment of the petitioner on a charge of attempting to defeat an estate tax imposed (28 U. S. C. 894(b)(2)(C)), and a further charge of delivering fraudulent statements and documents to delegates of Secretary of the Treasury (26 U. S. C. 7207) (R71).

At the time the aforementioned evidence was introduced, the conviction for an attempted income tax evasion was in the process of being appealed to the United States Court of Appeals for the Third Circuit, No. 12,313.

At the same time, the petitioner had not yet had his day in Court with respect to the indictment charging him with an estate tax violation.

At the trial, Judge Saylor advised (R73) that he would look into the matter of disciplinary proceedings against the petitioner which had been reported to the Court of Common Pleas No. 5 of Philadelphia County by the Committee of Censors of the Philadelphia Bar Association. It should be noted that the said Court of Common Pleas had not yet acted on the application of the Committee of Censors and that the petitioner had not yet been afforded an opportunity to answer the said charges.

The petitioner, Wilhelmina L. Rentschler, in her testimony could give no evidence of any dereliction of duty on the petitioner's part, and complained that she was "confused". No evidence was offered to show that Mr. Alker was physically or emotionally unable to attend to his fiduciary duties. To the contrary, the respondent presented evidence of a bank president, an attorney, a physician, and two trust officers of a bank, to the effect that the petitioner was capable—emotionally, physically, and professionally—of exercising his fiduciary duties.

In his opinion dated March 7, 1957, (R. 157), Judge Saylor removed the petitioner as fiduciary finding that a hostile relationship existed between Mr. Alker and Wilhelmina L. Rentschler, his co-executor, co-trustee and the life tenant and that the petitioner, a practicing attorney, was not trustworthy. The Trial Judge relied upon the petitioner's conviction of an income tax violation, bare indictment involving an estate tax violation and accusations in a petition to discipline the petitioner for alleged professional misconduct. The disciplinary action was awaiting a hearing (R. 165) in the Philadelphia Court of Common Pleas at the time Judge Saylor relied on the contents of the petition as substantive evidence.

In addition, Judge Saylor referred to evidence of impounded records of the Estate of Winfred S. Hurst, de-

ceased, No. 55,113, in the Orphans' Court of Montgomery County, Pa., where the petitioner was removed as Executor for the sole purpose of expediting the conclusion of that estate administration. The Trial Judge, the Hon. Leroy van Roden, of the Orphans' Court of Delaware County, Pennsylvania, specially presiding, ordered Mr. Alker's removal in the last mentioned estate not by reason of any dereliction of duty of any sort on Mr. Alker's part. (R. 143).

Judge Saylor referred to Judge van Roden's decree of April 17, 1956, (R. 152), which decree was revoked and declared null and void by Judge van Roden's subsequent decree of July 13, 1956. (R. 155). In referring to the decree of April 17, 1956, Judge Saylor apparently relied upon the petition averring Mr. Alker to be "neither fit, competent nor qualified to act as trustee," as substantive evidence of the facts therein averred.

Timely objection was made by petitioner's counsel to the introduction of these records. (R. 36); (R. 65). In addition the petition for re-argument appended hereto, discloses that the petitioner raised the United States Constitutional issue before the Supreme Court of Pennsylvania.

REASONS ADVANCED FOR ALLOWANCE OF THE WRIT.

The right of a fiduciary named in a decedent's will to serve and to receive compensation for his services is a property right of which he may not be deprived in a proceeding which is devoid of the fundamental fairness inherent in the concept of due process of law outlined in the Fourteenth Amendment to the Constitution of the United States. Alternatively stated, the question for disposition by this Court is whether a Trial Judge may deprive a fiduciary of his right to expect compensation for his services by a proceeding in which the Court admits into evidence bare allegations upon which the fiduciary has not yet had his day in court with no opportunity on the latter's part to rebut, explain or cross-examine the sources of the evidence which the Trial Judge found outside of the presence of the fiduciary or his counsel.

A. Was the petitioner deprived of his rights under the Fourteenth Amendment when the Trial Court failed to apply the plain meaning of the Fiduciaries Act of 1949 to the instant case?

The statute relied on for removal of the fiduciary is the Fiduciaries Act of 1949, Section 921, which reads as follows:

> "Section 921. Grounds and Procedure: The grounds and the procedure for the removal or discharge of a trustee and his surety and the effect of such removal or discharge shall be the same as are set forth in this act relating to the removal and discharge of a personal representative and his surety, with regard to the following:
>
> (1) Grounds for removal as in Section 331; . . . 1949, April 18, P. L. 512, Art. IX, Sec. 921; 20 P. S. 320.921 (1)."

Section 331 of the Fiduciaries Act of 1949, having been incorporated by reference into Section 921 thereof, provides as follows:

"Section 331. Grounds for Removal: The Court shall have exclusive power to remove a personal representative .....

(5) when, for any other reason, the interests of the estate are likely to be jeopardized by his continuance in office."

Inasmuch as the party attempting to remove Mr. Alker presented no testimony as to his mental and physical incompetency, the sole question remaining is whether the interests of the Estate of George W. Rentschler, deceased, are likely to be jeopardized by the petitioner's continuance in office. The removal of a trustee who enjoyed the confidence of the person who created the trust is a stringent and summary process and it must *clearly* appear from the evidence that a case was made out against the trustee and that the discretion of the Court in removing the trustee was properly exercised. It must also *clearly* appear that the executor or trustee is wasting or mismanaging the property or estate under his charge or that for any reason the interests of the estate are likely to be jeopardized by the continuance of such fiduciary in office. *Parson's Estate*, 82 Pa. 465; *Kaier's Estate*, 264 Pa. 107 Atl. 724, 296; *Hurley's Estate*, 313 Pa. 53, 55, 169 Atl. 81.

On the contrary, it is the duty of the Court to refuse to remove a fiduciary at the mere whim or caprice of the beneficiary. There should be a substantial reason appearing to the Court before it removes the trustee. *Crawford's Estate*, 340 Pa. 187; 16 A. 2d 521, 187, 190. The last cited case repeats the principle that the status of a testamentary trustee is not the same as that of a fiduciary appointed by the Court, for a testator has as a property right the privilege and power to place the management of his estate in a selected person as a condition of his bounty. *Crawford's Estate, supra. Glessner's Estate*, 343 Pa. 370, 22 A. 2d 701 at page 374; *Bailey's Estate*, 306 Pa. 334; 159 Atl. 549; *Mathues's Estate*, 322 Pa. 358, 185 Atl. 768 at page 359.

Even the active antagonism of the beneficiary of an estate toward the fiduciary, while undesirable, is not sufficient to compel the Court to order the latter's removal, unless such antagonism is provoked by the fiduciary and likely to jeopardize the estate. *Mathues's Estate, supra,* at page 361; *Neafie's Estate*, 199 Pa. 307, 49 Atl. 129.

The record in this case, taken as a whole, discloses no active antagonism between Miss Rentschler and Mr. Alker but merely an annoyance on Miss Rentschler's part motivated by what she terms her confusion. Such bare conclusions without supporting evidence of what possible dereliction on Mr. Alker's part may have caused her confusion certainly do not measure up to the standard of clear and satisfactory proof required to remove a fiduciary appointed by a testator. *Hartman's Estate*, 331 Pa. 422, 428, 200 Atl. 49. The mere fact that there is friction or hostility between beneficiary and fiduciary is not necessarily a sufficient ground for removal since otherwise the beneficiary by quarreling with the trustee could force the latter's removal without any dereliction on his part.

B. Did the actions of the Trial Judge in permitting the admission into evidence of the records of Mr. Alker's conviction in the United States District Court for the Eastern District of Pennsylvania violate the petitioner's constitutional rights under the Fourteenth Amendment?

The law in Pennsylvania is clear that a judgment of conviction in a criminal case is not admissible in evidence in a civil case as evidence of the facts upon which such conviction was based. *Nowak v. Orange*, 349 Pa. 217; 36 A. 2d 781; *Auslander v. Pennsylvania Railroad Company*, 350 Pa. 473, 39 A. 2d 595.

In the instant case a much more serious error was committed by the Trial Judge, for the judgment of conviction in Mr. Alker's income tax case was in the process of being appealed to the United States Circuit Court of Appeals for the Third Circuit, No. 12,313. No decision has been rendered by the Court of Appeals to date. The Courts are

agreed that convictions which are being appealed have no tendency whatever to support the facts upon which they are based and are therefore inadmissible as evidence of the truth of such facts in a civil action. 18 ALR (2d) 1298.

C. Were the rights of the petitioner under the Fourteenth Amendment violated when the Trial Judge permitted the admission into evidence of matters pending before the Philadelphia Bar Association?

Mr. Alker had not yet had his day in court with respect to the matter before the Philadelphia County Court of Common Pleas and the Trial Judge relied on evidence which he secured in an inquisitorial fashion by delving into the records out of the presence of the petitioner or his counsel. (R. 164). It should be noted here that no hearing had at that time been accorded to Mr. Alker on the complaint for alleged professional misconduct in the Court of Common Pleas of Philadelphia County. The petitioner had no opportunity to know the precise facts into which the Trial Judge was delving, and consequently the petitioner was afforded no privilege to rebut, explain or cross-examine the items which the Trial Judge apparently took as fact out of the presence of the petitioner and his counsel. The petitioner had no opportunity to know what the Trial Judge was examining when he inquired into the impounded records until after the Trial Judge's decision was rendered. Such inquisitorial tactics without a right of cross-examination is violative of the petitioner's rights under the United States Constitution. *Alford v. The United States*, 282 U. S. 687; 75 L. Ed. 624 also *In re Buchman*, 123 Cal. App. 2d 546, 267 P. 2d 73. The petitioner's constitutional right to notice and hearing of the allegations which the Trial Judge held against him cannot be taken away in the fashion that was attempted in the present case. The fundamental principles of justice required that Mr. Alker be given notice of the specific charges against him which would be utilized by the Trial Court in forming its opinion.

D. Were the petitioner's rights under the Fourteenth Amendment violated when the Trial Judge took into consideration decrees of court which had been subsequently superseded?

Mr. Alker's settlement of a controversy in the Montgomery County Orphans' Court with relation to the Hurst Estate amounted to nothing more than an offer in compromise and as such is inadmissible in evidence. Further, the last decree of Judge van Roden dated July 13, 1956, specified that the previous decree of April 17, 1956, was revoked and declared to be null and void. Nevertheless, the Trial Judge relied on the previous decree and its supporting petition, thereby compounding the error, (R. 163), and found Mr. Alker unfit to act as a fiduciary. Judge Saylor ignored Judge van Roden's order of April 17, 1956 (R. 143) in which the latter judge found that there was no dereliction of duty of any sort by the petitioner in the *Hurst Estate*. The prejudice and lack of fundamental fairness in the Trial Judge's action is so manifest as to require no citations of authority in support thereof.

E. Was the petitioner deprived of his rights under the Fourteenth Amendment when he was removed as Trustee in a proceeding where there was no evidence of any possible harm to the estate of which the petitioner was a co-fiduciary?

An examination of the entire record discloses not an iota of evidence to support Mr. Alker's removal as fiduciary. No evidence whatever was introduced that the interests of the estate were likely to be jeopardized by Mr. Alker's continuance in office. On the contrary, to remove Mr. Alker as co-fiduciary in this particular estate would set off a chain of events whereby Mr. Alker, a practicing attorney and a fiduciary of many other substantial estates, could be summarily removed in all these other estates.

CONCLUSION.

The cumulative effect of the Trial Judge's errors was to deny the petitioner the fundamental procedural due process guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. This is so by reason of the fact that the petitioner was not given notice of the facts which would be used against him when the Trial Judge delved into records out of presence of the petitioner and his counsel. The additional prejudicial effect of relying upon a conviction in the process of appeal and bare allegations in an indictment serve to heap further confusion into a record already over-burdened with error. The Trial Judge's conception of his duty was entirely erroneous for he had no right to deprive the petitioner of a proceeding where fundamental fairness required due notice of all facts upon which the Court would rely.

WHEREFORE, your petitioner Harry J. Alker, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on April 14, 1958.

Respectfully submitted,

FRANK F. TRUSCOTT,
929 Land Title Building,
Philadelphia 10, Pa.,
Counsel for Petitioner.

APPENDIX.

THE CONSTITUTIONAL PROVISION INVOLVED IN THE CASE.

This proceeding concerns the due process clause of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OPINION OF THE COURT.

(Filed March 17, 1958)

PER CURIAM.

Decree affirmed at appellant's costs on the able opinion of the hearing judge whose comprehensive findings are fully supported by the evidence, were confirmed by the court en banc on exceptions thereto and well justify the legal conclusions which produced the final decree.

For PETITION FOR REARGUMENT see Page 14

ORDER OF THE COURT.

April 15, 1958, petition denied.

PER CURIAM.

PETITION FOR REARGUMENT.

To the Honorable the Justices of the Said Court:

The petition of HARRY J. ALKER, JR., Appellant in the above case, respectfully prays your Honorable Court to grant him a rehearing for the following

REASONS

1. The Honorable Court misapprehended the judicial law of the Commonwealth of Pennsylvania in removing Appellant, pursuant to the decree of the Orphans' Court, (R-172-a, 181-a), as co-executor and co-trustee under the will of George W. Rentschler, deceased, which resulted in depriving the Appellant of a property right without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 9, of the Constitution of the Commonwealth of Pennsylvania.

2. The Honorable Court misapprehended the testimony offered in evidence by Appellee in that there was no evidence offered to the effect that the said estate was in any way placed in jeopardy. On the contrary, the adminstrative duties involved were fully and competently performed by the Appellant and his co-executors, both individual and corporate. (Appellant's Brief 8).

3. The Honorable Court misapprehended the probative value of Federal Indictment No. 18730 (R-126-a et seq.) and Indictment No. 18306 (R-15-a, et seq.), and the convictions thereon in the Federal District Court for the Eastern District of Pennsylvania, in that they do not involve matters concerning the Estate of George W. Rentschler, deceased, and for the further reason that both of the said convictions based on the above referred to indictments are now on appeal to the United States Court of Appeals for the Third

Circuit, and upon which the Court relied in reaching its decision to remove Appellant from his fiduciary offices.

4. The Honorable Court misapprehended the force and effect of the decree of July 13, 1956, (R-155-a) issued by President Judge van Roden of the Orphans' Court of Delaware County, sitting specially in Montgomery County, revoking his prior decree of April 17, 1956, which latter decree was relied upon by the Hearing Judge in his opinion and adopted per curiam by this Honorable Court.

5. The Honorable Court misapprehended the probative value of proceedings not yet completed before the Disciplinary Committee of the Montgomery County Bar Association (in which proceedings complainant's evidence has been heard, but not the testimony and witnesses of respondent there, Appellant here); said incomplete proceedings having been relied upon by the court below in rendering its decision is in violation of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 9 of the Constitution of the Commonwealth of Pennsylvania.

6. The Honorable Court misapprehended the probative value of the proceedings before the Philadelphia County Bar Association for disciplinary action for the reason that such proceedings were inadmissible in evidence in that the Appellant had not had his hearing de novo as required by Rule 200-f of the Rules of Civil Procedure for the Courts of Common Pleas of Philadelphia County.

7. The Honorable Court has overlooked the statement of the United States Attorney in conceding that Counts II and III of Indictment No. 18730 may be dismissed and sentences thereon be vacated; said action occurring after this Honorable Court heard oral argument in the instant case, and which indictment and conviction thereon in the

United States District Court for the Eastern District of Pennsylvania were relied upon by your Honorable Court in reaching its decision.

8. The Honorable Court misapprehended the judicial law in rendering its decision in the instant case in that it deviated from, and the decision is in conflict with, the established state law thereby depriving the Appellant of equal protection under the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 9 of the Commonwealth of Pennsylvania.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a reargument in this appeal.

/s/ FRANK F. TRUSCOTT
Counsel for Appellant.

(Jurat)